

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF HAWAII  
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4                   \_\_\_\_\_  
5                   WAYNE BERRY,                   )  
6                   Plaintiff,                   )   CIVIL NO. 01-00446SPK-LEK  
7                   vs.                   )  
8                   FLEMING COMPANIES, INC.,                   )  
9                   aka FLEMING FOODS, INC.,                   )  
10                  aka FLEMING, DOE                   )  
11                  INDIVIDUALS 1-50 and                   )  
12                  DOE PARTNERSHIPS,                   )  
13                  CORPORATIONS and OTHER                   )  
14                  ENTITIES 1-20,                   )  
15                  Defendants.                   )  
16                  \_\_\_\_\_  
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18                   TRANSCRIPT OF PROCEEDINGS

19                   The above-entitled matter came on for Further  
20                   Jury Trial commencing at 9:00 a.m. on Thursday,  
21                   February 27, 2003, Honolulu, Hawaii,  
22

23                   BEFORE:   HONORABLE SAMUEL P. KING  
24                   United States District Judge  
25                   District of Hawaii

26                   REPORTED BY:   LISA J. GROULX, COURT REPORTER  
27                   Notary Public, State of Hawaii

EXHIBIT **2**

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A P P E A R A N C E S

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6 FOR PLAINTIFF: TIMOTHY J. HOGAN, ESQ.

7 WESLEY W. ICHIDA, ESQ.

8 LYNCH ICHIDA THOMPSON KIM & HIROTA

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14 FOR DEFENDANTS: LEX R. SMITH, ESQ.

15 ANN TERANISHI, ESQ.

16 Kobayashi, Sugita & Goda

17 First Hawaiian Center

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19 Honolulu, Hawaii 96813

20 (808) 539-8700

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24 ALSO PRESENT: Ralph Stussi

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I N D E X

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7 PLAINTIFF'S WITNESSES:

PAGES

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9 WAYNE BERRY

10 Cross-examination (resumed) by Mr. Smith 4

11 Redirect examination by Mr. Hogan 104

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EXHIBITS:

MARKED

RECEIVED

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Plaintiff's Exhibit 29

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Plaintiff's Exhibit 137

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1 this document, Mr. Stussi was attempting to refer to  
2 three separate other documents.

3 THE COURT: Why do you say that? Where  
4 does he say that?

5 THE WITNESS: When you read down, if we  
6 go down here we see the Settlement and Asset Purchase.  
7 Those refer to the settlement and release, I assume,  
8 and some sort of Asset Purchase Agreement. It also  
9 refers to my EULA.

10 All I did was remove all references to  
11 anything having to do with API, the settlement and  
12 release and the asset purchase, and we changed the  
13 subject line to referencing my Freight Control System  
14 license.

15 This was nothing more than an addendum. It  
16 was not an overriding document. It was nothing. And  
17 I think that is my understanding. And I think it  
18 pretty much explains my position on this document.

19 THE COURT: One thing that confuses me.  
20 The first line by Mr. Stussi: I am in receipt of the  
21 end user license agreement and addendum you have  
22 prepared dated October 29, 1999.

23 THE WITNESS: That's the first one.

24 THE COURT: I have not seen this  
25 document on Monday evening and must say it's not

1 acceptable to Fleming Companies, Inc.

2 THE WITNESS: Yes.

3 THE COURT: So they rejected it, the  
4 original.

5 THE WITNESS: No. He asked for changes  
6 which were incorporated in this addendum.

7 THE COURT: Where does he say he wanted  
8 changes?

9 THE WITNESS: Down at the bottom, in  
10 paragraph three he says we must have the ability to  
11 change and modify reports that come out of the system.

12 THE COURT: Okay. Go ahead.

13 Q. No where in this document did you use the  
14 word "addendum," correct?

15 THE COURT: Well, he did.

16 Q. Mr. Berry, in the changes that you wrote into  
17 Exhibit 62 you never said "addendum" or that this was  
18 an addendum, did you?

19 A. Well, my EULA says it can only be modified  
20 through addendums. So it's somewhat implied.

21 Q. My answer is correct, though, right? You  
22 never said in this document that it was an addendum?

23 A. That's correct.

24 Q. And you never added anything to this document  
25 to indicate that Fleming was going to be obligated